

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH W. PEMBERTON

Claimant

VS.

STATE OF KANSAS

Respondent

AND

STATE SELF INSURANCE FUND

Insurance Fund

Docket No. 1,025,705

ORDER

Claimant appealed the March 25, 2010 Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Workers Compensation Board heard oral argument on June 23, 2010.

APPEARANCES

Sally G. Kelsey of Lawrence, Kansas, appeared for claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At the oral argument before the Board, claimant's attorney agreed that claimant had a 5 percent preexisting condition.

ISSUES

This is a claim for a September 1, 2005 accident, which involved an altercation at work and claimant allegedly being shoved against a drafting table. In the March 25, 2010 Award, ALJ Hursh denied claimant's request for benefits as he determined claimant failed

to prove he sustained injury arising out of and in the course of his employment. The ALJ stated:

Three physicians, Dr. Bieri, Dr. Carabetta, and Dr. Prostic[,] testified the work incident contributed to the claimant's neck injury (he was eventually found to have a herniated disk at C5-C6 for which Dr. Hess performed surgery), but in each case the physician's opinion assumed the shoving incident happened. Since it is held the record failed to prove the shoving incident happened, the doctors' causation opinions were not considered persuasive.¹

Claimant contends he has sustained his burden of proof that he suffered an injury that arose from his employment. Claimant requests the Board reverse the ALJ's Award and grant claimant compensation for his permanent impairment. In support of that request, claimant points to his consistent description of the events of September 1, 2005, testimony of other witnesses and the neck treatment he received subsequent to the September 1, 2005 incident.

Respondent contends claimant lacks credibility. Respondent argues claimant did not suffer personal injury by accident, that the claim is not compensable, and that any neck impairment is unrelated to the altercation at work.

The issues before the Board on this appeal are:

- Did claimant suffer a personal injury by accident? If so, did the accident arise out of and in the course of his employment with respondent?

Claimant's attorney objected to the admission of the civil service board order marked as Exhibit 1 to Marlin McGowin's deposition transcript. The ALJ failed to rule on this objection. The Board concludes the order is admissible but accorded it little weight. The order addresses the termination of the claimant. The incident of September 1, 2005, was at issue in that proceeding so there is some relevance to the instant case. However, the issue in the civil service case is different from the workers compensation case, different statutes come into play and what evidence was considered in the civil service case is not clear.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

¹ ALJ Award (March 25, 2010) at 3.

On September 1, 2005, the claimant was employed as a physical plant supervisor for the respondent. Claimant had been working for the respondent about a year and a half before September 1, 2005.² Prior to returning to work in 2004 claimant had received Social Security disability benefits for at least 10 years based on his diagnoses of fibromyalgia and chronic fatigue syndrome.³

The claimant supervised a number of employees in the grounds and maintenance department, including Troy Miller. Mr. Miller was employed as a mason. The record indicates claimant and Mr. Miller had no relationship outside of work.⁴ In March 2005, the claimant provided Mr. Miller with his annual performance evaluation. The claimant rated Mr. Miller as “unsatisfactory.” The claimant testified that after the March 2005 unsatisfactory evaluation Mr. Miller was confrontational and verbally abusive to him.⁵

On September 1, 2005, the claimant called Mr. Miller in to his office to sign some paperwork. A physical altercation ensued between the claimant and Mr. Miller, resulting in both being transported by ambulance to the hospital. This incident also resulted in claimant being dismissed from his position with respondent.⁶

How the altercation commenced, unfolded and ended is in dispute. Thus, the Board will set out a summary of the testimony of the four witnesses who either participated in or witnessed the incident on September 1, 2005. Below is the summary of their testimony regarding the altercation.

Claimant's testimony

Claimant testified that after Mr. Miller arrived in claimant's office he started arguing and asking the same questions over and over again. After asking or telling Mr. Miller to leave his office at least three times, claimant got up to leave and he picked up his walkie-talkie, which he testified he was to carry with him at all times. According to claimant, Mr. Miller blocked the exit path and grabbed claimant's right arm. Claimant then pulled against Mr. Miller's arm and threw his (claimant's arm) over Mr. Miller's so the forearms of claimant and Mr. Miller met. Claimant got his hand free and hit Mr. Miller with the walkie-

² P.H. Trans. at 13.

³ *Id.*

⁴ *Id.*, at 14, 35.

⁵ *Id.*, at 17.

⁶ R.H. Trans. at 13.

talkie and pushed Mr. Miller to the floor. Claimant then yelled for help. Claimant got on top of Mr. Miller to restrain him until help arrived. Seconds later, claimant's supervisor, Marlin McGowin, arrived. Mr. McGowin stated: "Stop fighting, get off of him, get off of him." Claimant testified that when he was approximately two-thirds of the way to an erect position Mr. McGowin grabbed his shoulders with both hands and violently shoved him about 5 or 6 feet up against a drafting table, causing his back to hit the table. The shoving caused claimant's neck to jerk. Claimant then sat down and waited for an ambulance to arrive.⁷

Mr. Miller's testimony

At the time of the altercation, Troy Miller had worked for the respondent 17 years.⁸ Mr. Miller testified that on September 1, 2005,⁹ he was called in to claimant's office to sign some papers. He testified the two exchanged unpleasant words, then claimant got up and started walking towards Mr. Miller and stated: "Get out of here." As Mr. Miller was reaching for his sunglasses, which were on a flat surface in claimant's office, he was struck by claimant with claimant's walkie-talkie. Mr. Miller then went for the door and was jumped from behind by claimant. Mr. Miller fell face first to the floor and was restrained by the claimant. At this moment, Mr. Miller soiled his pants. Mr. Miller testified he did not make any effort to fight or make a sound for fear of losing his job until someone entered the office. When someone entered the office, Mr. Miller yelled: "Get off me." When claimant was pulled off Mr. Miller, Mr. Miller got up and left claimant's office and waited for the ambulance to transport him to the hospital. Mr. Miller testified he did not strike the claimant, although he may have reacted defensively, nor did he see anyone push or strike the claimant.¹⁰

Mr. McGowin's testimony

Marlin McGowin, claimant's supervisor, testified that on September 1, 2005, he responded to the altercation between claimant and Mr. Miller because his secretary hollered at him about the commotion.¹¹ When Mr. McGowin entered claimant's office,

⁷ P.H. Trans. at 17-21.

⁸ *Id.*, at 35.

⁹ The questioning of Mr. Miller references a December 1, 2005 date with regard to the subject incident, but it appears that date is an erroneous reference.

¹⁰ P.H. Trans. at 38-42, 46-47.

¹¹ McGowin Depo. at 9.

claimant was on top of Mr. Miller. Seeing this, Mr. McGowin ordered claimant to get off of Mr. Miller. Claimant did not respond. When Mr. McGowin ordered claimant, a second time, to get off Mr. Miller, claimant did so. Mr. McGowin put his hand underneath claimant's left shoulder and helped him up. Mr. McGowin testified that when he was there no one threw claimant across the room.¹²

Mr. Gostautas' testimony

Richard Gostautas, a co-worker of the claimant, testified that on September 1, 2005, he heard voices getting loud and then some scuffling. According to Mr. Gostautas' testimony, this caused him to enter claimant's office. Upon entering claimant's office, he observed Mr. Miller on the floor and claimant was leaning with his arm across Mr. Miller's body. Mr. Miller was not moving. Claimant said that Mr. Miller had attacked him and he needed help. Responding to claimant's request, Mr. Gostautas went around the corner and yelled down the hall for the secretary to call security. He then returned to claimant's office and claimant was still on top of Mr. Miller. Shortly after Mr. Gostautas returned to claimant's office, Mr. McGowin arrived. Mr. Gostautas testified that Mr. McGowin told claimant to get off Mr. Miller. The next thing Mr. Gostautas remembers is Mr. McGowin moving in front of him and then he saw Mr. Miller getting up and claimant was sitting on the floor. Mr. Gostautas testified the size of claimant's office is about 12 feet by 12 feet.¹³

Eight days after the altercation claimant visited his personal physician and the doctor's notes reflect claimant did not mention the neck condition.¹⁴

Claimant testified that as a result of being shoved into the drafting table he injured his neck, lower back, upper right back and side and around the shoulder blade.¹⁵ Claimant testified that he still has problems with his upper right back and side and around his shoulder blade.¹⁶ A number of doctors were authorized over the course of the years to treat claimant for his neck and shoulder complaints. In spite of treatment claimant was not getting better. Therefore, an MRI was ordered in 2008. As a result of this MRI, a herniated disk was discovered. This discovery resulted in an anterior cervical discectomy and fusion of C4-C6 being performed in June 2008.

¹² *Id.*, at 2-4.

¹³ Gostautas Depo. at 4-13.

¹⁴ Bieri Depo., Ex. 2.

¹⁵ R.H. Trans. at 8, 9.

¹⁶ *Id.*, at 9.

Dr. Peter V. Bieri examined claimant on May 15, 2007, and May 18, 2009, with regard to the September 1, 2005 incident.¹⁷ When Dr. Bieri examined claimant in 2007 he diagnosed him with chronic cervicothoracic strain.

Dr. Bieri first opined that claimant's degenerative disk disease was not caused by the September 1, 2005 incident.¹⁸ Later in his deposition, he opined that the herniation occurred as a natural and probable consequence of the initial injury.¹⁹ Finally, Dr. Bieri indicated claimant had a 15 percent impairment.²⁰

Dr. Edward J. Prostic performed a court-ordered independent medical evaluation (IME) on September 2, 2009. Dr. Prostic found claimant had a 15 percent impairment to the neck with two-thirds of the impairment related to the September 1, 2005 incident.²¹ Stated another way, claimant had a 15 percent impairment to the neck with a 5 percent preexisting condition. Dr. Prostic indicated that the September 1, 2005 accident, more likely than not, aggravated or accelerated the progression of preexisting disease if claimant did not have previous complaints about his neck and assuming the accident was as claimant's attorney described at the doctor's deposition and claimant had contemporaneous complaints about his neck soon after the accident.²²

Dr. Vito J. Carabetta initially saw claimant for a court-ordered IME on June 23, 2006. On March 15, 2007, Dr. Carabetta rated claimant as having a 5 percent whole person impairment. However, at his January 2010 deposition, Dr. Carabetta agreed that the AMA *Guides* would put claimant at a 15 percent impairment rating post surgery and that it would be appropriate to provide a 5 percent preexisting impairment.²³ Dr. Carabetta indicated that the altercation of September 1, 2005, as described by claimant's attorney at the doctor's deposition, was a significant, contributing factor leading to claimant's June 2008 surgery.²⁴

¹⁷ Bieri Depo. at 3.

¹⁸ *Id.*, at 15.

¹⁹ *Id.*, at 19.

²⁰ *Id.*, at 21.

²¹ Prostic Depo. at 7.

²² *Id.*, at 31.

²³ Carabetta Depo. at 30, 31.

²⁴ *Id.*, at 29, 30.

All three physicians based their causation opinions on claimant's history of the altercation. When Dr. Prostic and Dr. Carabetta were presented with the scenario that the altercation may not have occurred as claimant reported they indicated the eventual surgery probably was not related to the September 1, 2005 incident.²⁵

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.²⁶ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²⁷

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.²⁸

K.S.A. 2005 Supp. 44-508(d) defines "accident":

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. . . .

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.²⁹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.³⁰

²⁵ Carabetta Depo. at 18; Prostic Depo. at 17, 18.

²⁶ K.S.A. 2005 Supp. 44-501(a).

²⁷ K.S.A. 2005 Supp. 44-508(g).

²⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

²⁹ K.S.A. 2005 Supp. 44-501(a).

³⁰ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase ‘out of’ employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises ‘out of’ employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises ‘out of’ employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase ‘in the course of’ employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.³¹

Respondent alleges that claimant did not meet with personal injury by accident. K.S.A. 2005 Supp. 44-508(d) defines “accident” as “an undesigned, sudden and unexpected event.” Respondent argues that claimant’s action of taking his walkie-talkie and hitting Mr. Miller was intentional and, thus, not undesigned, sudden or unexpected. On the contrary, there is nothing to suggest claimant had premeditated or intentionally planned to strike Mr. Miller. Claimant and Mr. Miller exchanged unpleasant words and an altercation ensued. The altercation was related to work since the incident took place at work and claimant and Mr. Miller were discussing a work situation when the altercation ensued. Why the altercation occurred and who was the aggressor is not necessary in determining whether the workers compensation claim is compensable. The Kansas Court of Appeals has held that the identity of an aggressor in a confrontation is not necessary to determine if a workers compensation claim is compensable.³²

The issue in this matter is whether claimant sustained his burden of proof that he suffered any injury and disability as a result of an accident arising out of and in the course of his employment with respondent. The ALJ found that claimant did not sustain his burden of proof. The Board agrees.

It is undisputed that an altercation occurred on September 1, 2005. Claimant testified that during that altercation, claimant was physically shoved by Mr. McGowin, claimant’s supervisor, against a drafting table 5 to 6 feet from where claimant and Mr. Miller’s contact occurred. Yet, no person in the room at the time witnessed this alleged

³¹ *Id.*, at 278.

³² *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985). Also see *Jordan v. Pyle, Inc.*, 33 Kan. App. 2d 258, 101 P.3d 239 (2004), *rev. denied* 279 Kan. 1006 (2005).

act. Mr. Miller was on the floor when claimant got up. Mr. Miller testified that he did not see anyone strike or push claimant. Mr. McGowin denied anyone throwing claimant across the room. It is understood that both of these witnesses are less than objective and unbiased. However, Mr. Gostautas, a co-worker, also testified. He was in the doorway of the 12- by 12-foot room when claimant got off Mr. Miller. He did not see claimant shoved or pushed against a table, an act which claimant described as violent enough to cause claimant's back to hit the table and his neck to jerk. Such a violent action in a 12- by 12-foot room would be very obvious to all persons in the room.

All three doctors' opinions are, at least in part, based on the history provided by the claimant. The description of the incident provided by the claimant differs markedly from that of every other person in the room at the time. When the IME doctors, Dr. Carabetta and Dr. Prostic, were presented with the scenario that the incident may not have occurred as claimant reported they indicated it was probable the eventual surgery was not related to the September 1, 2005 incident.

In considering the totality of the record, the Board finds the claimant has failed in his burden of proving he suffered either temporary or permanent injury and disability as a result of a September 1, 2005 accident that arose out of and in the course of his employment with respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the finding, decision and order that the Board affirms the ALJ's Award dated March 25, 2010, denying claimant benefits.

IT IS SO ORDERED.

³³ K.S.A. 2009 Supp. 44-555c(k).

Dated this ____ day of August, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Kenneth J. Hursh, Administrative Law Judge